

DELEGATED LEGISLATION

FACULTY OF LAWS – 2017

ADMINISTRATIVE LAW

Delegated legislation - GENERAL

- When Parliament delegates its powers to other persons or bodies it is called subsidiary legislation.
- Article 82(1) of the Constitution states that a Minister must head government departments in order to preserve ministerial responsibility - however in practice, modern government is largely managed by unelected officials through delegated legislation and other devolved public management.
- Acts of Parliament which allows the various authorities to lay down rights and duties to all those concerned. Therefore, all legislation can be classified as either primary or delegated.
- Legislation is subsidiary if it **owes its existence and authority to other legislation**, implying that it is not primary.
- The public is no less obliged to comply with the requirements of delegated legislation than with the requirements of primary legislation.

Delegated legislation - GENERAL

- An Act may **empower an authority to make regulations, rules or bye-laws, to make orders, to give directions** and so on ...
- Acts are passed as mere **skeletons**, with the appropriate Minister being empowered to add the details, by means of subsidiary legislation made under a Department regulated by a particular Act.
- Once Parliament has approved fundamental principles of a legal change, it is **not necessary to return and occupy further Parliamentary time**, whenever the detail requires to be altered.
- It should be noted that subsidiary legislation is not integrated into the legislation it is amended by but it is a **separate piece of legislation**

Delegated legislation - FOR

- The subject matter on which legislation is required is, very often, **simply too technical** for the issues to be fully appreciated, understood and so be properly discussed in Parliament. Hence legislative power is then necessarily entrusted to Ministers employing scientific or other experts, in various fields.
- Delegated legislation can be amended without any, or in some cases much use of Parliamentary time, so that anything which is expected to be altered in the light of experience or in order to react to **changing circumstance**
- Subsidiary legislation serves as a tool to **correct faults in earlier legislation** and also to make corrective purpose of the later legislation clear
- The **detail can be adapted** with greater care and minuteness and with better adaptation to local or other special circumstances than they can possibly be in the passage of a Bill through Parliament.

Delegated legislation - FOR

- Delegated legislation enables the results of **consultation with interests** affected by the operation of new Acts to be translated into practice
- Details of primary legislation are **simply too complicated and lengthy** to pass
- A **convenient means** of bringing an Act into force at such time as the Government of the day considers appropriate - '**breathing space**' is often required to set up the necessary administrative machinery
- Convenient means of **amending existing Acts of Parliament**, sometimes even by modifying the enabling Act itself (Example: In virtue of the Value Added Tax Act the Minister of Finance may make regulations and publish such regulation in various legal notices by the powers conferred in Article of the said Act. The Article in fact provides that the Minister "*may exercise various powers in the making of regulations mainly those of amending, cancelling or substituting any of the Act's Schedules.*")
- Some Acts that allow various departments and authorities to make delegated legislation also set out that there **must also be prior consultation** before the regulations are created. (Example: planning policies prepared by the Planning Authority)

Delegated legislation – CONTROLS

- Article 11(1) of the Interpretation Act states that “where an Act of Parliament or other Act passed by the Legislature of Malta or an Ordinance confers power to make rules or regulations or other subsidiary legislation of a like nature, any such legislation made by virtue of those powers after the coming into force of this Act shall as soon as may be after it is made be laid on the Table of the House and if, **within the period of twenty-eight days after it is so laid**, the House resolves that it be annulled or amended, the same shall thereupon cease to have effect or shall be so amended, as the case may require, but without prejudice to the validity of anything previously done there under or to the making of new rules, regulations or other subsidiary legislation of a like nature”.
- Thus, the fate of the instrument therefore **depends upon the chance of a member seeing the document and securing a debate**

Delegated legislation – INTO PLAY

- Article 6(d) of the Interpretation Act, Chapter 249 of the Laws of Malta provides that the power to legislate includes also an **implied power to revoke, amend and re-enact legislation**. This article states that “*where such Act confers a power to make any rules, regulations or bye-laws, the power shall, unless the contrary intention appears, be construed as including a power, exercisable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend, or vary the rules, regulations or bye-laws, and such power shall be exercisable without prejudice to the making of new rules, regulations or bye-laws*”.
- Article 8 of the Interpretation Act, Chapter 249 of the Laws of Malta - unless the contrary intention appears, an expression found in delegated legislation has the **meaning that it bears in the parent Act**.

Delegated legislation - CHALLENGES

- ❑ It is always necessary for the person who is drafting **it to acquaint himself thoroughly with the whole of the enabling statute** and particularly **with the purpose of the statute**. In fact many of the difficulties which occur in the construction of subsidiary legislation are the result of apparent incompatibility with the principal legislation.
- ❑ The equilibrium of the separation of powers is altered by conferring on the executive that which more properly belongs to the legislature.
- ❑ Taking the law making power from the democratically elected Parliament and instead the law making power is given to the **unelected civil service employees** and other experts working under the supervision of a particular Ministry.
- ❑ Subject **to less Parliamentary scrutiny** than primary legislation where Bills undergo revisions during the Parliamentary stages.
- ❑ Too much delegated legislation so that it is **difficult to know what the law is**.

Delegated legislation - CHALLENGES

- When a power is conferred on the executive there is inevitable scope for the power to be abused. The **wider the discretionary powers, the greater are the potential and possibility of abuse.**
- **Discretion** is granted to promote and put into effect governmental policies in to effect expediently and therefore it **should not be used to bring about results** which were not contemplated in the Act conferring the power to delegate legislation **BUT** if the power is conferred on the executive in a manner which is **lawful and permissible**, the delegation cannot be held to be excessive **merely** on the ground that the legislature **could have** made more detailed provisions.

CONCLUDING THOUGHTS

- Has the chain of direct accountability through Parliament to the electorate been broken as a result of which, ministerial responsibility serves to strengthen the executive?
- Is “the obligation to answer for the responsibility conferred” maintained? (namely, is accountability maintained?)
- What is subsidiary legislation is used to change policies in ways which weren't envisaged when the enabling primary legislation was passed?